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28455 7590 03/27/2008
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EXAMINER

ROBERTS, LEZAH

ART UNIT

PAPER NUMBER

1612

MAIL DATE

DELIVERY MODE

03/27/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

DETAILED ACTION

This Office Action is in response to the amendment filed January 9, 2008. All previous rejections have been withdrawn unless stated below.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims

Claim Rejections - 35 USC § 102 – Anticipation (Previous Rejections)

1) Claims 118 and 131-133 were rejected under 35 U.S.C. 102(b) as being anticipated by Wienecke et al. (US 4,626,427). The rejection is maintained.

Applicant's Arguments

Applicant argues there is no suggestion in the Wienecke that cardamom oil can be used in confectionary products as an antimicrobial agent. The term "effective amount" in the claim introduces a purpose limitation that has to be considered when comparing the claim to the prior art. Applicant further argues a new use of either a known composition of matter or a known method is patentable. This is further supported by case laws such as In re Marschall, In re Shetty, In re Woodruff, In re Halleck, Eli Lilly & Co. v. A.H. Robins Co. Applicant asserts the court's analysis is clear; the purpose expressed in "effective amount" claims is a positive limitation that must be disclosed in the prior art to render the claim unpatentable. This argument is not persuasive.

Examiner's Response

Applicant is arguing a new use for the composition yet a composition is being claimed and not a method. The cases cited by Applicant appear to disclose different methods for old or previously disclosed compositions or compounds and therefore do not appear to apply to the instant case of claiming an old or previously disclosed composition of compound itself. The cardamom oil will inherently have the antimicrobial function since the oil in the compositions is used in the same amounts as those disclosed by the instant specification and therefore meet the limitation of “effective amount”.

2) Claims 100-104, 105-107, 111-120 and 129-136 were rejected under 35 U.S.C. 102(e) as being anticipated by Hyodo et al. (US 6,537,595). The rejection is maintained.

Applicant's Arguments

Applicant argues there is no suggestion in Hyodo et al. to use cardamom oil as an antibacterial agent in chewing gum or other confection. This argument is not persuasive.

Examiner's Response

The flavoring in the compositions of Hyodo comprises 0.001% to 1.25% of the chewing gum compositions, which is considered an “effective amount” when looking to the instant specification and its examples. Therefore, the cardamom oil will inherently have the antimicrobial function as recited in the instant claims since the oil in the

compositions is used in the same amounts as those disclosed by the instant specification. Also see Examiner's Response above.

3) Claims 100-103, 105, 111-120, 126, 128-129 and 131-136 were rejected under 35 U.S.C. 102(e) as being anticipated by Hirose et al. (US 5,149,521). The rejection is maintained.

Applicant's Arguments

Applicant argues there is no suggestion in Hirose et al. to use cardamom oil as an antibacterial agent in chewing gum or other confection. This argument is not persuasive.

Examiner's Response

The flavoring in the compositions of Hirose et al. comprises up to 1% of the chewing gum compositions, which is considered an "effective amount" when looking to the instant specification and its examples. Therefore, the cardamom oil will inherently have the antimicrobial function as recited in the instant claims since the oil in the compositions is used in the same amounts as those disclosed by the instant specification. Also see Examiner's Response above.

Claim Rejections - 35 USC § 103 – Obviousness (Previous Rejections)

1) Claims 108-110 were rejected under 35 U.S.C. 103(a) as being unpatentable over Hyodo et al. (US 6,537,595) in view of Zamudio-Tena et al. (US 4,828,845). This rejection is maintained.

Applicant's Arguments

Applicant argues there is no suggestion in Zamudio-Tena of using cardamom oil or that cardamom oil can be used as an antimicrobial agent. Even if the two references were combined it would not result in a compositions as recited in the instant claims comprising a gum base, a sweetener, a flavor, and an effective amount of an antimicrobial agent wherein the antimicrobial agent comprise cardamom oil. This argument is not persuasive.

Examiner's Response

The secondary reference, Zamudio-Tena et al., is used to disclose that coatings are at times incorporated into the coatings of chewing gums and that chewing gums are at times coated. It would have been obvious to one of ordinary skill in the art to have used a coating on the chewing gums of the primary reference to make a gum with good appearance, good texture, good flexibility, good film-forming properties and good crunchiness. In regards to the antimicrobial activity of the cardamom oil, as discussed above, the cardamom oil will inherently have the antimicrobial function as recited in the instant claims since the oil in the compositions is used in the same amounts as those disclosed by the instant specification.

2) Claims 100, 104, 106, 111-118 and 127 were rejected under 35 U.S.C. 103(a) as being unpatentable over D'Amelia et al. (US 6,030,605) in view of Wienecke et al. (US 4,626,427). This rejection is maintained.

Applicant's Arguments

Applicant argues there is no suggestion in D'Amelia of using cardamom oil. Even if the two references were combined it would not result in a compositions as recited in the instant claims comprising a gum base, a sweetener, a flavor, and an effective amount of an antimicrobial agent wherein the antimicrobial agent comprise cardamom oil. This argument is not persuasive.

Examiner's Response

D'Amelia et al. disclose a chewing gum composition that is used for the same purposes as Wienecke et al. As previous cited precedent establishes, generally, it is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition to be used for the very same purpose; the idea of combining them flows logically from their having been individually taught in the prior art. In re Kerkhoven, 626 F.2d 846, 850, 205 USPQ 1069,1072 (CCPA 1980); In re Crockett, 279 F.2d 274, 126 USPQ 186 (CCPA 1960). Therefore it would have been obvious to have combined the teachings of the two references to make a third composition to enhance the treatment of malodor in the mouth. In regards to the antimicrobial activity of the cardamom oil, as discussed above, the cardamom oil will inherently have the antimicrobial function as recited in the instant claims since the oil in the compositions is used in the same amounts as those disclosed by the instant specification.

Claims 100-120 and 126-136 are rejected.

Claims 71-88 and 90-99 are withdrawn.

No claims allowed.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **LEZAH W. ROBERTS** whose telephone number is (571)272-1071. The examiner can normally be reached on 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Frederick F. Krass can be reached on 571-272-0580. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1612

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lezah W Roberts/

Examiner, Art Unit 1612

/Frederick Krass/

Supervisory Patent Examiner, Art Unit 1612